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In The

Supreme Court of the United States

October Term, 1960

No. .....

STATE OF ALABAMA, ex rel. MACDONALD GALLION, As Attorney General of the State of Alabama,

Petitioner,

V.

WILLIAM P. ROGERS, As Attorney General of the United States, (Robert F. Kennedy, Successor in Office), et als,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Attorney General of Alabama, on behalf of the State of Alabama, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above captioned case on January 23, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama is reported at 187 F. Supp. 848, 5 Race Relations Law Reporter 766, and is printed in Appendix A hereto, *infra*, pp. 8-9. The opinion of the Circuit Court of Appeals is unreported and is printed in Appendix B hereto, *infra*, pp. 10-12.

JURISDICTION

The judgement of the Court of Appeals (Appendix B, *infra*, pp. 10-12) was entered on January 23, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the Circuit Court of Montgomery County, Alabama, had no jurisdiction.

2. Whether the District Court and the Court of Appeals should have remanded the case to the Circuit Court of Montgomery County, Alabama, for further proceedings.

3. Whether a three-judge court should have been convened to decide the Constitutional issues raised by the pleadings.

4. Whether Title III of the Civil Rights Act of 1960 is unconstitutional.

5. Whether Section 301, Title III, of the Civil Rights Act of 1960, is so vague and uncertain as to be legally unenforceable.

6. Whether the demand of the Attorney General (R. 19) was so broad as to be beyond the authority conferred on the Attorney General by Title III of the Civil Rights Act of 1960.

7. Whether the District Court erred in dismissing Petitioner's Bill of Complaint.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and Statutes involved are:

Article I, Section 9, Clause 3.

Amendment IV.

Amendment V.

Amendment VI.

Amendment X.

Amendment XV.

Title III of the Civil Rights Act of 1960, Section 301 (P. L. 86-449, 74 Stat. 88, 42 U. S. C. 1974).

Title III of the Civil Rights Act of 1960, Section 302 (P. L. 86-449, 74 Stat. 88, 42 U. S. C. 1974a).

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Title III of the Civil Rights Act of 1960, Section 306 (P. L. 86-449, 74 Stat. 88, 42 U. S. C. 1974e).

Act No. 54, General Acts of Alabama 1959, p. 97, Section 1.

28 U. S. C., Section 2282.

They are printed in Appendix C, *Infra*, pp. 13-17.

STATEMENT

On May 23, 1960, under alleged authority of Title III of the Civil Rights Act of 1960, the Attorney General of the United States made written demand requesting the Board of Registrars of Montgomery County, Alabama, to make available for inspection and copying its registration and voting records relating to elections for federal office (R. p. 19). A like demand was made under date of May 9, 1960, as to Wilcox County, Alabama (R. p. 21).

On June 6, 1960, Petitioner filed a Bill of Complaint in the Circuit Court of Montgomery County, Alabama, against Respondents.

The Complaint alleges the unconstitutionality of the applicable provisions of said Title III; that the same are too vague and indefinite to be legally enforceable, that the demand was too broad; that Respondents were acting in an unconstitutional manner and in excess of and beyond any authority granted by the Act. (R. pp. 3-18).

The Circuit Court granted a temporary injunction enjoining Respondents from examining, inspecting, reproducing or copying the records and papers in the custody, possession, and control of the several Boards of Registrars of the various counties of Alabama, pending a hearing set for July 7, 1960 (R. pp. 22, 23, 24).

On June 11, 1960, Respondents filed a petition for removal of the cause to the United States District Court for the Middle District of Alabama, Northern Division (R. p. 26), and on the same day filed Motion to Dismiss (R. p. 31).

Petitioner filed Motion to Remand on July 6, 1960 (R. p. 40).

After holding that Title III of the Civil Rights Act of 1960 was constitutional; that no provisions thereof were vague and uncertain; that the demand for records was not too broad (R. pp. 108-120), the court denied the Motion to Remand and dismissed the Bill of Complaint (R. pp. 120,121).

The Court of Appeals affirmed the action taken by the District Court in a per curiam opinion (R. pp. 137-139).

REASONS FOR GRANTING THE WRIT

1. The Respondent has contended in the Lower Courts in this case (R. pp. 31-32 and R. pp. 84-86), and in other cases (*In re MacDonald Gallion, Attorney General of the State of Alabama, et als.* Civil Action No. 1011, and *United States of America v. Emmett F. Hildreth, Circuit Judge, etc., et al.*, Civil Action No. 1012, N. D. of Alabama, Western Division) that the Federal Courts have *exclusive* jurisdiction to decide the issues presented herein. There is nothing in the Civil Rights Act of 1960 (P. S. 86-449, 74 Stat. 88, 42 U. S. C. 1974-1974e) which confers such exclusive jurisdiction. *Tsang v. Kansas*, 173 F. 2d 204 cert. denied, 337 U. S. 939; and *Claflin v. Houseman*, 93 U. S. 130.

In the case of *United States of America v. State of Alabama*, 362 U. S. 602, 4 L. Ed. 2d 982, 80 S. Ct. 924, this Court expressly reserved to the State of Alabama the right to question the contitutionality of the Civil Rights Act of 1960.

We contend that the State Court which first acquired jurisdiction, had the authority and jurisdiction to guard and enforce rights secured by the Constitution of the United States. *Johnson v. Wilson*, 45 F. Supp. 597, aff. 131 F. 2d 1; 21 C. J. S., Section 526, Courts, page 797; *Hower v. Mass. Unemp. Comm.*, 5 N. E. 2d 720 cert. denied 300 U. S. 657; *Witherbee v. Johnson*, 14 Mass. 303; *Ammedown v. Freeland*, 101 Mass. 303; *Capitol Traction Co. v. Hof*, 174 U. S. 1; *Parsons v. Bedford*, 3 Pet. 433; *State v. Sawyer*, 94 A. 886; *Sampsell v. Straub*, 194°F. 2d 228; *Hearst Publications v. United States*, 70 F. Supp. 666, aff. 168 F. 2d 751; *Sweeney v. City of Louisville*, 102 F. Supp. 525.

See also *U. S. v. Lewis*, 100 A. 2d 40; *Parkhill v. Todd Shipyards Corp.* 76 N. Y. S. 2d 363.

2. Therefore, the case should have been remanded to the Circuit Court of Montgomery County, Alabama, for adjudication, and from which appeals could have been prosecuted through the State Supreme Court and to this Court in the usual way.

3. Even if remand by the Federal Court was not proper, the case should not have been decided by a single District Judge, who stated with regard to the questions raised, " . . . they are substantial questions. . . . " (R. p. 65.)

Since an Act of Congress was alleged to be unconstitutional and injunctive relief was sought, a three-judge Court was necessary and the District Judge erred in deciding the case himself. Title 28, U. S. C., Section 2282.

4. The questions presented are important questions of federal law which have not been, but should be, settled by this Court, inasmuch as they are constantly arising in other cases and affect the voter registration processes in every State of the Union. The broad powers given to the Attorney General of the United States by Title III of the Civil Rights Act of 1960 were not before the Court in the case of *United States v. Raines*, 362 U. S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519, since the Civil Rights Act of 1960 had not been enacted at the time of that decision.

In our view, the Courts below have incorrectly decided the issues raised by the Petitioner.

Basically, we contend that the several sections of Title III of the Civil Rights Act of 1960 are unconstitutional or do not constitute appropriate legislation in that they either run contrary to or are not authorized by the provisions of the Constitution, specifically Article I, Section 9, Clause 3 (dealing with ex post facto laws); Amendment IV (dealing with unreasonable searches and seizures); Amendment V (dealing with due process of law); Amendment VI (dealing with the right of confrontation); Amendment X (dealing with reserved powers); and Amendment XV (dealing with the right to vote).

Title III attempts to vest the Attorney General of the United States with the kind of "accusatory function" which was condemned by Mr. Justice Frankfurter in his separate opinion in *Hannah v. Larche*, 363 U. S. 420-486, 4 L. Ed. 1307, 1352, in that powers attempted to be conferred on the Attorney General are part of a process which may lead to criminal prosecution or an adjudication by a court that the registrars have engaged in the practice of depriving persons of their right or privilege to vote because of race or color. In so doing, Title III constitutes ex post facto legislation, allows unreasonable searches and seizures, violates due process of law, denies the accused the right of confrontation, invades the powers reserved to the States or to the people, and is not appropriate legislation under the XVth Amendment.

5. Title III is couched in such vague, uncertain and indefinite terms as to make it inoperative and void. The provisions therein for the retention of certain records and papers for a period of twenty-two months is not clear as to when the period of twenty-two months commences. In addition, the registration laws of Alabama (Title 17, Section 31, Code of Alabama 1940, as amended by the 1959 Acts of Alabama, p. 97) permit the Board of Registrars to destroy applications of unsuccessful applicants thirty days after such applications are denied. Under this state of facts, a Board of Registrars conceivably could have destroyed the applications of unsuccessful applicants prior to the time of demand being made for such records and papers by the Attorney General of the United States. This could be done in all innocence, because the Registrars could not be expected to anticipate when, or

even if, the Attorney General would ever demand the right to inspect, reproduce, and copy such records and papers.

There should be definity in a statute which involves possible criminal consequences.

6. The demand (R. p. 19) and the Order and Judgment (R. p. 120) were too broad in that although Section 303 of Title III required only records required by Section 301 to be retained, the demand (R. p. 19), and the Order and Judgment (R. p. 120) required the production of *"all records and papers"* in the custody of the Board relating to applications, etc., requisite to voting in certain elections, which could mean records kept from time immemorial. The Act did not authorize such a demand or Order and Judgment, and they are void.

7. In any event, the District Court should not have dismissed, and the Court of Appeals should not have affirmed the dismissal of, the Complaint, but a three-judge Court should have been ordered because of the substantial constitutional questions involved.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MacDonald Gallion,
Attorney General
of Alabama

Willard W. Livingston,
Chief Assistant Attorney General
of Alabama

Leslie Hall,
Assistant Attorney General
of Alabama

Gordon Madison,
Assistant Attorney General
of Alabama

Counsel for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

STATE OF ALABAMA, EX REL.)
MacDONALD GALLION AS)
ATTORNEY GENERAL OF THE)
STATE OF ALABAMA,)
Complainant,)

vs. CIVIL ACTION NO. 1616-N

WILLIAM P. ROGERS, AS)
ATTORNEY GENERAL OF THE)
UNITED STATES OF AMERICA; JOSEPH M. F. RYAN, JR.,)
AS ACTING ASSISTANT)
ATTORNEY GENERAL OF THE)
UNITED STATES OF AMERICA,)
CIVIL RIGHTS DIVISION; J.)
EDGAR HOOVER, AS DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION;)
R. B. MILLER, AS SPECIAL)
AGENT IN CHARGE OF THE)
FEDERAL BUREAU OF INVESTIGATION; SPENCER H.)
ROBB, AS SENIOR RESIDENT)
AGENT OF THE FEDERAL)
BUREAU OF INVESTIGATION;)
JOHN DOE, RICHARD DOE,)
BEING THE PERSON OR PERSONS WHO HAVE BEEN DIRECTED BY THE ATTORNEY)
GENERAL OF THE UNITED)
STATES TO OBTAIN RECORDS)
AND PAPERS PERTAINING TO)
ACTS REQUISITE TO VOTING)
IN ALABAMA,)
Respondents.)

ORDER AND JUDGMENT

This cause is now submitted upon the motion of the State of Alabama on the relation of MacDonald Gallion as Attorney General for the State of Alabama, seeking to have this Court remand this cause to the Circuit Court of Montgomery County, Alabama, from whence same was removed. This cause is also submitted upon the motion of William P. Rogers, Attorney General of the United States, and the other respondents named herein, seeking to have this Court dismiss this action upon the general grounds that the Circuit Court of Montgomery County, Alabama, was without jurisdiction, since that court has no power to review the exercise of discretion of the Attorney General of the United States when acting pursuant to the Civil Rights Act of 1960.

Upon consideration of said motions and for the reasons set forth in the opinion of this Court made and filed herein on this date, and for good cause shown, it is the ORDER, JUDGMENT and DECREE of this Court that the motion of the State of Alabama ex rel. MacDonald Gallion, as Attorney General for the State of Alabama, seeking to have this Court remand this cause to the Circuit Court of Montgomery County, Alabama, be and the same is hereby overruled and denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion of William P. Rogers, Attorney General of the United States, and the other respondents named herein, seeking to have this Court dismiss the bill of complaint, be and the same is hereby granted.

Done, this the 11th day of August, 1960.

FRANK M. JOHNSON, JR.
United States District Judge

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18562

CRUM DINKINS, MRS. ROBERT S. LAMPLEY, and GEORGE PENTON, as Members of the Board of Registrars of Montgomery, County, Alabama,

Appellants,

versus

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL,

Appellees.

No. 18585

STATE OF ALABAMA, Ex Rel, MacDonad Gallion as Attorney General of Alabama,

Appellant,

versus

WILLIAM P. ROGERS, Attorney General of the United States, ET AL,

Appellees.

Appeals from the United States District Court for the Middle District of Alabama

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(January 23, 1961.)

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2 *Dinkens, et al. v. The Atty. Genl. of the U. S., et al.*

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and MIZE, District Judge.

PER CURIAM: The judgements of the trial court in these two cases, consolidated for hearing on the trial, are hereby affirmed on the basis of the well reasoned opinion by the trial court. 187 F. Supp. 848.

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By Gilbert F. Gannehean, Deputy

New Orleans, Louisiana

February 1, 1961

JUDGMENT

Extract from the Minutes of January 23, 1961.

STATE OF ALABAMA, Ex Rel, MacDonald Gallion as Attorney General of the State of Alabama,

No. 18585. versus

WILLIAM P. ROGERS, Attorney General of the United States, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX C

Constitution of the United States:

Article 1, Section 9, Clause 3. No Bill of Attainder or ex post facto Law shall be passed.

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia; when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

Amendment XV, Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Title III of the Civil Rights Act of 1960, section 301 (P. L. 86-449, 74 Stat. 88, 42 U.S.C. 1974). Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation.

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Title III of the Civil Rights Act of 1960, section 302 (P. L. 86-449, 74 Stat. 88, 42 U.S.C. 1974a). Theft, destruction, concealment, mutilation, or alteration of records or papers; penalties.

Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 1974 of this title to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Title III of the Civil Rights Act of 1960, section 303 (P. L. 86-449, 74 Stat. 88, 42 U.S.C. 1974b). Demand for records or papers by Attorney General or representative; statement of basis and purpose.

Any record or paper required by section 1974 of this title to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

Title III of the Civil Rights Act of 1960, section 304, (P.L. 86-449, 74 Stat. 88, 42 U.S.C. 1974c). Disclosure of records or papers.

Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this subchapter, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

Title III of the Civil Rights Act of 1960, section 305 (P. L. 86-449, 74 Stat. 88, 42 U.S.C. 1974d). Jurisdiction to compel production of records or papers.

The United States district court for the district in which a demand is made pursuant to section 1974b of this title, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

Title III of the Civil Rights Act of 1960, section 306 (P. L. 86-449, 74 Stat. 88, 42 U.S.C. 1974e). Definitions.

As used in this subchapter, the term "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of

the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

Act No. 54, General Acts of Alabama 1959, page 97, section 1.

"Section 31. The board of registrars shall have power to examine, under oath or affirmation, all applicants for registration, and to take testimony touching the qualifications of such applicants. In order to aid the registrars to judicially determine if applicants to register have the qualifications to register to vote, each applicant shall be furnished by the board a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the Supreme Court of Alabama and be filed by such court with the Secretary of State of the State of Alabama. The questionnaire shall be so worded that the answers thereto will place before the registrars information necessary or proper to aid them to pass upon the qualifications of each applicant. The questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance. There shall be incorporated in such answer an oath to support and defend the constitution of the United States and the constitution of the State of Alabama and a statement in such oath by the applicant disavowing belief in affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the state of Alabama by unlawful means. The answers and oath shall be duly signed and sworn to by the applicant before a member of the board. If solely because of physical handicaps the applicant is unable to read or write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board shall read to the applicant the questionnaire and oath herein provided for and the applicant's answers thereto shall be written down by such board member; and the applicant shall be registered as a voter if he meets all other requirements herein set out. Each member of the board is authorized to administer the oaths to be taken by applicants and witnesses. The question-

naires and written answers of persons applying for registration shall not become public records as public records are defined under the law of the state of Alabama, nor shall the board disclose the information contained in such questionnaires and written answers, except with the written consent of the person who filed the answer or pursuant to the order of a court of competent jurisdiction in a proper proceeding. Such questionnaires and the answers of applicants shall be preserved by the board for a period of thirty days, after denial after which, if no appeal has been taken as provided in section thirty-five of this title, they shall be kept with the records of the board of registrars or disposed of in such manner as the board may direct."

28 U. S. C. A. 2282.

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."